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11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF ARIZONA**

13 United States of America,

14 Plaintiff,

15 v.

16 Abdul Malik Abdul Kareem,

17 Defendant.

No. CR 15-00707-PHX-SRB

**DEFENDANT'S CONSOLIDATED REPLY
IN SUPPORT OF DEFENDANT'S MOTION
FOR NEW TRIAL AND MOTION FOR
JUDGMENT OF ACQUITTAL**

18 The United States of America (the "Government"), through its undersigned counsel,
19 opposed Defendant, Abdul Malik Abdul Kareem's ("Abdul Kareem") Motion for New Trial
20 and Motion for Judgment on Acquittal on the bases that there is no merit to Kareem's argument
21 that the Government abused discovery. As Abdul Kareem's Motion and this Reply
22 demonstrate, the Government has violated this Court's numerous orders, it violated its
23 Constitutional obligations under *Brady*, and it continues to violate those obligations.

24 The Government filed its Consolidated Response [to] Defendant's Motion for New Trial
25 and Motion for Judgment of Acquittal ("Response") on May 3, 2016; however, on May 6,
26 2016, it made a supplemental discovery of bates stamp number 003237-003243, 302 reports
of three interviews of John Sabari ("Sabari"), conducted in May of 2015. (Ex. 1) These
disclosures were made over a year after the first interview took place and confirm that the
Government has still not fulfilled its disclosure obligations. The interview taken on May 4,
2015 makes reference to previous interviews of Sabari that have not been disclosed (Ex. 1, p.

1 003238) Sabari said he was only on a motorcycle social media website and forum. (Ex. 1, p.
2 3237-38) Sabari stated that Simpson was close with Saabir ["Nurse"], Salim and James Bell
3 and there was no mention of Abdul Malik.

4 The second interview occurred on May 8, 2015 (Ex. 1 at 003239-240) from 3:10 p.m.
5 until 5:20 p.m. and was electronically recorded. That electronic recording still has not been
6 produced and apparently it contains information about people who were close to Simpson
7 including Soofi, James Bell, Saabir Nurse, Saleem, and Abdul Malik.

8 Sabari admitted he was active on a forum operated by Sheikh Faisal ("Faisal"); the
9 individual that the Government went to great lengths to argue was followed by Abdul Kareem,
10 who denied that he was a follower. Sabari admitted he was an administrator of Faisal's Paltalk
11 room called Authentic Tawheed and that he communicated with Faisal via Skype and in the
12 past he had facilitated calls between Faisal, Soofi and Simpson. (Ex. 1, 003239) There is no
13 mention of Abdul Kareem contacting Faisal. There is probably more information on the
14 audiotape; however, the document never mentions Abdul Kareem accompanying Soofi and
15 Simpson to Sabari's residence and participating in these calls. This information would have
16 gone a long way to backing up Abdul Kareem's statements that he did not follow Faisal and
17 showing a significant activity that Soofi and Simpson participated in with a known terrorist or
18 terrorist sympathizer that did not include Abdul Kareem. These 302s and the audiotape should
19 have been turned over to the defense under *Brady* since they are exculpatory and are favorable
20 to the defense.

21 Sabari admitted his knowledge of Simpson's "birdofgreen" Twitter account and its
22 support of ISIS. (Ex. 1, p. 003240) It appears that Sabari probably knew about the tweets made
23 by Simpson before the Garland incident. Also, Sabari said that Saabir [Nurse] was Simpson's
24 employer and friend and was generous with his money. (Ex. 1, p. 003240) This information
25 would have corroborated the defenses theory that it was Saabir Nurse who gave Simpson the
26 money that he used to finance the Garland incident rather than Abdul Kareem.

1 Lastly, Sabari confirms Abdul Kareem’s testimony about his falling out with Simpson
2 over finding a listening device in his car. (Ex. 1, p. 003240)

3 Clearly, Sabari was an important witness, known to the Government, whose testimony
4 was helpful to the defense. The Government’s contention is that it did not commit any
5 discovery violations nor any *Brady* violations and if it did, that the Defendant’s sole remedy
6 was to seek a continuance. The Government fails to understand that the trial in this case began
7 on February 16, 2016 and that the complained of discovery violations occurred before, during,
8 and after the trial and that the Defendant had a right to a speedy trial that included that his
9 Constitutional rights be protected and that the Court’s orders not be violated.

10 **I. Background**

11 As the Government notes, pursuant to the Joint Notice of Scheduling Order filed on July
12 31, 2015, the parties agree to an October 12, 2015 *Brady* disclosure deadline. The Government
13 states that *Brady* disclosures encompass only “evidence that is material and exculpatory”
14 (Response, p. 3, lines 21-22) and footnote 1 of the Scheduling Order deadline applied only to
15 evidence that was in the Government’s possession as of October 12, 2015. Clearly the
16 documents that have been turned over to Defendant on May 6, 2016 were in the Government’s
17 control and possession as of October 12, 2015, as is the two hour and ten minute tape recording.
18 Additionally, a great many of the documents turned over by the Government after October 12,
19 2015 were in the Government’s possession and control prior to October 12, 2015.

20 In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that the due
21 process clause requires the prosecution to disclose, upon request, evidence favorable to an
22 accused person when such evidence is material to guilt or punishment. On June 23, 2015,
23 Abdul Kareem filed a general request for all discovery that Defendant would be entitled to,
24 including *Brady* material. See Ex. 2. Evidence “favorable to an accused” includes exculpatory
25 evidence and evidence that impeaches a Government witness. *U.S. v. Bagley*, 473 U.S. 667,
26 673 (1985); *Milke v. Ryan*, 711 F.3d 998, 1012-13 (9th Cir. 2013). Thus, a *Brady* violation

1 occurs when: 1) evidence is favorable to the accused because it is exculpatory or impeaching;
2 2) evidence was suppressed by the prosecution, either willfully or inadvertently; and 3)
3 prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

4 Favorable evidence is material if there is a reasonable probability that the disclosure
5 evidence would have changed the outcome of the proceeding. *See U.S. v. Kohring*, 637 F.3d
6 895, 903-06 (9th Cir. 2011). A reasonable probability under *Bagley* is a probability sufficient
7 to undermine confidence in the outcome. 473 U.S. at 678, 682 (plurality opinion)(*see also*
8 *Cone*, 556 U.S. at 452)(evidence is material when there is “reasonable probability that the
9 withheld evidence would have altered at least one juror’s assessment [of the case]”). Aside
10 from exculpatory evidence, the Government is obligated to disclose information that could be
11 used to impeach Government witnesses, especially where the witness’ testimony is an important
12 part of the Government’s case. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

13 **II. Speedy Trial**

14 The Sixth Amendment speedy trial guaranty, the Speed Trial Act of 1974 (18 U.S.C. §§
15 3161-74), and the Federal Rules of Criminal Procedure protect defendants from undue post-
16 accusation delay. The right to a speedy trial attaches at the time of arrest or formal charges,
17 whichever comes first. The remedy for violation of this right is to dismiss the indictment and
18 vacate any sentence that has been imposed. *See Strunk v. United States*, 412 U.S. 434, 440
19 (1973).

20 **III. Prosecutorial Misconduct**

21 The prosecutor’s duty in a criminal prosecution is to seek justice. *See Berger v. U.S.*,
22 295 U.S. 78, 88 (1935). Prosecutorial misconduct justifies reversing a conviction when it so
23 infects the trial with unfairness as to the make the resulting conviction a denial of due process.
24 *Darden v. Waynewright*, 477 U.S. 168, 181 (1986). The failure to make timely and complete
25 disclosures resulted in Abdul Kareem receiving an unfair trial.

1 Prosecutors may not knowingly present false testimony and have a duty to correct
2 testimony that know to be false. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Plus, the
3 prosecutor must disclose evidence favorable to the defendant if the defendant so requests. *See*
4 *Banks v. Dretke*, 540 U.S. 668, 692 (2004); *see also Strickler v. Greene*, 527 U.S. 263, 281-82
5 (1999). It appears that Agent Whitson did not disclose others, that he knew knew about the
6 Mohammed Drawing Contest before it occurred besides NS; *i.e.*, Bell and Sabari. It appears
7 that Sabari probably knew about the contest since the 302s that were produced on May 6, 2016
8 state that he was aware of Simpson's Twitter account. (Ex. 1, p. 003240). When this is added
9 to Bell's statements set forth in the opening brief, it leads to the inescapable conclusion that the
10 Government was withholding evidence that it knew or should have known was favorable to the
11 defense. Whether he listened to Bell's interview; it seems doubtful that the interviewing agents
12 did not inform him. Bell, Sabari and Nurse were all close friends and confidants of Simpson.
13 The evidence at trial suggests that Nurse gave money to Simpson that he used to carry out the
14 incident at Garland. There is no connection between Nurse and Abdul Kareem and now the
15 May 2015 interviews of Sabari that were partially turned over on May 6, 2016 confirm the
16 closeness of the relationship between Simpson and Nurse and that Nurse was generous with his
17 money. Nurse's May 4, 2015 and May 21, 2105 interviews were not disclosed by the
18 Government until January 29, 2016. It appears based on Agent Whitson's testimony that there
19 were other interviews of Nurse that were conducted but never disclosed (RT 3/3/16 118). The
20 Government contends Agent Whitson was speculating; however, he is clear that others
21 conducted interviews after he prepared the handwriting on the electrostatic page on or about
22 October 21, 2015. (R.T., 3/3/16 111)

23 Bell was interviewed on May 5, 2016 but the recorded interview was not disclosed until
24 February 11, 2016 and the 302 not until February 18, 2016. The Government agrees that Bell
25 knew of the Garland attack in advance by virtue of reading one of Simpson's tweets (Response,
26 p. 20, lines 18-19) which is consistent with Sabari's statements. Why did the Government wait

1 to turn over this material until during the trial, at the same time it was inundating the defense
2 with new reports and massive amounts of new material?

3 Lastly, the Government misstates when it said Abdul Kareem provided information to
4 the Government about Sabari during his May 2015 interview (Response, p. 21, lines 14-15).
5 Kareem knew an individual named Yahya but did not know his actual name. (*See* Ex. 3). The
6 defense did not know the identify of Yahya and the Government kept it from the defense.

7 1. Specific misstatements and misleading comments made in the Response. Page
8 2, lines 1-3, the Government argues that the defendant fails to acknowledge when complaining
9 about mistrial production of interview reports that the great majority of these reports concerned
10 interviews that occurred just a few days earlier. This is not accurate. Four reports produced
11 on February 9, 2016 (2435-2446, 2447-2448, 2449-2450, and 2451), and three CDs produced
12 on February 11, 2016 (2454-2456), were all dated in May of 2015. It is true that the
13 Government did produce interview CDs and 302 reports from May 2015 as of August 3, 2015
14 but the defense question why these other reports were not produced at that time but were
15 produced on the eve of trial.

16 Additionally, there were several 302s that were not produced until after the trial began.
17 NS was interviewed on February 8, 2016 and the reports were not produced until February 17,
18 2016 and February 23, 2016. Amber Pluff was interviewed on January 15, 2016 and that
19 interview was not produced until February 23, 2016. Mr. Ochoa was interviewed on February
20 8, 2016 and it was not produced until February 23, 2016. Knowing that the trial was beginning
21 on February 16, 2016, all of these pretrial interviews should have been produced prior to the
22 start of trial, especially Ms. Pluff's which was done a month before the trial started.

23 On December 23, 2015, the defense had to request interview reports for Anthony
24 Sampson and Stuart Sampson that were taken on May 3, 2015 and the Government contends
25 on page 21 of its Response that the defense did not request the reports on John Sabari. The
26 defense did not know the name of Sabari. It is difficult to request what you do not know but

1 it is clear that Sabari who was interviewed three times by the Government in May 2015
2 including a two hour ten minute interview that was recorded that has yet to be turned over, was
3 of great interest to the Government.

4 Between February 17, 2016 and February 23, 2016, after the trial had started, the
5 Government produced bates numbers 2590-3236 and claimed that many of these were “simply
6 reformatted versions of items that had previously disclosed . . . some of the reformatting and
7 redisclosure was done at the request for defense counsel. (Response, p. 2, lines. 10-11) Of the
8 585 pages of documents produced on February 23, 2016 (2561-3236):

- 9 1) 3199-3202 are dated May 20, 2015;
- 10 2) 3203-3206 is dated May 28, 2015;
- 11 3) 3207-3210 is dated August 19, 2015;
- 12 4) 3211-3214 is dated May 28, 2015; and
- 13 5) 3225-3236 - some appear to have been submitted to the FBI in May and June 2015;
- 14 however, there were a few that were not even submitted to the FBI for processing until January
15 26, 2016 and February 2, 2016.

16 Beginning on page 6 of their Response, the Government continually states that it
17 disclosed on September 2, 2015 or October 13, 2015 two hard drives that contained a great
18 many of the files. However, the Government is well aware that the defense was unable to open
19 the files. (*See* Ex. 4, Declaration of Gayle Sipe) Defense contacted the Government on
20 September 11, 2015 and again on September 15, 2015 advising them that we could not access
21 the hard drive. (Ex. 4, ¶¶ 4 and 5) Eventually, in a telephone call between AUSA Brook, FBI
22 Agent Whitson and Gayle Sipe, the paralegal for the defense, on September 17, 2015, Whitson
23 advised that the defense would not be able to open the files without an expert. (Ex. 4, ¶ 6) This
24 put the defense at a disadvantageous from the start because the defense had to go through the
25 approval process through the CJA to get an expert up to speed just to access documents that the
26 Government was providing. (Ex. 4, ¶ 7) This process of producing documents that the defense

1 was unable to open was continually a problem in that the Government provided the wrong
2 passwords, there were the wrong CDs that were provided, as in #405. (Ex. 4, ¶ 13) The
3 Government then uploaded documents to USAFZ, beginning in late January 2016, and on
4 January 29, 2016, the defense advised the Government that it was not able to utilize USAFZ
5 except for Mary Plomin, but that our paralegal who was in charge of document production
6 could not, the Government then sent a hard drive replacement on February 4, 2016 that did not
7 work nor could be accessed. (Ex. 4, ¶ 12)

8 The chart that the Government has attached as Exhibit 1 to its Response is incomplete
9 and misleading for the following reasons:

10 Creation dates are conveniently left off of documents, *i.e.*:

11 Pg. 6(d) produced on 1/21/16 included firearm reports dated June-August 2015 and
12 search warrant photos from defendant's apartment 6/10/15;

13 Pg. 7(e) produced on 1/21/16 included approximately 400 pages dated from May 2015 -
November 30, 2015;

14 Pg. 8(f) Bates #2286 produced on 2/2/16 is dated 5/5/15; Bates #2288 (CD) produced
15 on 2/3/16 is dated 5/22/15;

16 Pg. 8(g) Interviews (2447-2451) produced 2/9/16 are dated 5/20/15; and (2434-2446)
is dated May 4, 2015;

17 Pg. 11 (2634 and 2636) CDs are dated 10/20/15;

18 Pg. 13 - Mubarak interview was taken on 2/3/16, the report finalized on 2/8/16, and not
19 produced until 2/15/16;

20 Pg. 14 - Reports 2524-2531 were produced on 2/11/16 and 3199-3214 were produced
on 2/23/16, however the lab request analyses were dated May 2015-August 2015;

21 Pg. 16 - Ochoa interview was taken on 2/8/16, the report finalized on 2/16/16, and not
22 produced until 2/23/16;

23 Pg. 16 Reports 2908-3087 were produced 2/23/16; however the lab requests are from
May 2015;

24 Pg. 17 Saabir Nurse letters produced (3220) on 2/23/16 were from 2010, 2012 and 2014
25 and included letters from/to Saabir Nurse, a person listed on defendant's list of witnesses;

26 Pg. 20 (#10) - Interview reports were redacted and defense only received unredacted
reports on 2/24/16, after several prior requests;

1 Pg. 21 - Carlos was interviewed on 12/14/15, however, his report was not produced until
2 1/29/16.

3 It is a little unclear on several of the documents when they were given to the FBI
4 analysts, because the date of receipt is not disclosed.

5 **IV. Other Trial Discovery Abuses**

6 **A. James Bell**

7 The Government disclosed audio recordings of James Bell's May 5, 2015 interviews on
8 February 11, 2016, five days before trial. The Government claims inadvertence. On February
9 11, 2016, the defense requested copies of the 302 reports which then were not provided until
10 February 18, 2016. The audio recording provided on the eve of trial while the defense is in the
11 process of doing jury instructions, marking exhibits and preparing for trial was several hours
12 long. The Government contends that "none of Mr. Bell's statements were material;" however,
13 if they were not material, why did the Government include him on a preliminary witness list?
14 Although they claim he was not a final witness list, he was on the February 8, 2016 witness list.

15 **B. Amber Pluff Report on February 23, 2016**

16 Ms. Pluff was interviewed on January 15, 2016; however, her report was not disclosed
17 for a month, until February 15, 2016.

18 **C. Jeffery Evans Reports**

19 Mr. Evans did not draft his report until February 24, 2016. Extraction and analysis of
20 the Hiren 15.1 CD were conducted on February 22 and 23, 2016, and the forensic report
21 produced on February 23, 2016. Bates numbers 1419-1420 demonstrate that Mr. Evans had the
22 Lenovo in September 2015. Evans report clearly should have been produced earlier.

23 **D. Kelli Edmiston Demonstrative Exhibits**

24 Ms. Edmiston's exhibit was finalized on February 12, 2016 but produced at 6:38 p.m.
25 on February 18, 2016 to be used in testimony the next day.
26

1 **E. Addition of Exhibits 488-496**

2 The Government notes at pages 16 and 17 that IA Vaughn's and SA Whitson's report
3 summarizing the findings of the search and analysis of the Internet history of the Acer computer
4 was disclosed on January 29, 2016. However, some of these were dated July 7, 2015, and
5 others January 15, 2016.

6 On page 17, the Government notes that Exhibit 496 consisting of photocopies of pages
7 from a blue steno notebook from the Simpson-Soofi apartment were disclosed on November
8 6, 2015 but the author was not identified. On November 12, 2015, defense counsel sent a letter
9 stating that we were unable to read the notebook and requesting the identity of the author. This
10 was never provided.

11 **F. Information About Ali Biaz and Christian Leon**

12 The interviews of Biaz and Leon were both on May 20, 2015, but they were not
13 disclosed until February 9, 2016. The Government contends that they did not contain
14 exculpatory evidence; however, the defense contends that they were favorable to the defense.
15 The defense should have been given these timely so that it could have explored these two
16 individuals. They may be the ones who sold the guns to Soofi and/or Simpson contrary to the
17 Government's contention. Because of the late disclosure, and the cumulative effect of these
18 late disclosures, these individuals were not able to be interviewed by the Defendant.

19 It appears that Biaz was selling an AK-47 at the time it appears Simpson purchased such
20 a weapon. The Government takes Biaz's word that he was selling a Century Arms AK-47 with
21 little or no investigation. Meanwhile, Leon told the Government that even though he had
22 exchanged texts with Soofi about an AK-74 he did not sell his to Soofi. This information was
23 helpful to the defense.

24 **V. Conclusion**

25 It is clear that the Government intentionally withheld large amounts of evidence that it
26 had in its possession for months, some as long as eight months before turning it over to the

1 defense. The Government had over two hundred (200) FBI agents that worked on the
2 investigation, and at least twenty (20) FBI analysts. (T.T. 3/8/16, p. 178) Also, the U.S.
3 Attorneys' office had two attorneys that handled the trial but there were numerous other U.S.
4 Attorneys that appear to have been drafting motions and assisting behind the scene.

5 The defense consisted of two attorneys, a part-time paralegal and a part-time private
6 investigator. The deck was stacked against the defense especially when the disclosures began
7 to come in fast and furious on the eve of trial. There are numerous things that must be done
8 before trial such as prepare a jury questionnaire, voir dire questions, exhibits, jury instructions,
9 opening statements, plus prepare for cross-examination and direct examination of witnesses.
10 This case was made even more difficult because the Muslim Community was and is afraid and
11 in many cases refused to talk with defense counsel. The defense needed all leads timely to
12 prepare the defense. Due to the volume of material produced by the Government right before
13 the trial began, plus during trial coupled with the defenses limited resources, it was impossible
14 for the defense to analyze all the new material, meet with potential witnesses, and weave it into
15 the defense's case.

16 It is a fair conclusion that the Government acted in bad faith in withholding some of the
17 most important witness interviews until the eve of and during trial and producing them along
18 with volumes of other material thus ensuring that the defense could not uncover and utilize all
19 the information beneficial to the defense.

20 Clearly, Simpson was very close to Bell and Sabari both who followed his tweets and
21 it appears they knew about the Garland attack before it happened. Bell and Sabari along with
22 Nurse knew of Simpson's radical activities along with his contacts with Faisal; however, their
23 interviews were turned over just before trial, during trial and in the case of Sabari after trial.
24 All contain *Brady* material and this information would have been beneficial to the Defendant.

25 Ali Biaz and Christian Leon were both interviewed by the Government in May 2015;
26 however, their statements were not turned over until February 9, 2016. It was not possible for

1 the defense to investigate these leads on such short notice. If the Government had 200 agents
2 at its disposal, it should have at least turned over the fruits of its investigation in a timely
3 fashion rather than holding on to it until trial and after to give the defense an opportunity to
4 investigate all sources of favorable or probably favorable evidence.

5 The Government did not comply with its obligations. As demonstrated by this case,
6 prosecutors take the position that they are to decide what could be helpful to the defense and
7 whether it is material which runs contrary to the philosophy of the *Brady/Giglio* line of cases
8 and increases the risk that exculpatory evidence will be suppressed.

9 Although ours is an adversary system, the Government's job is not to win but to see that
10 justice is done. The Government's agents have vast discretion about what leads to follow,
11 which witnesses to interview, what tests to conduct and countless other aspects of an
12 investigation which can include the manipulation of evidence to conceal it. It is the
13 responsibility of the Government to make timely disclosure to the defense of information that
14 could be favorable to the defense and to do it timely so that the defense can investigate its
15 benefit and make arrangements to use it.

16 Clearly, many of the disclosures that were late by the Government are favorable to the
17 defense. Abdul Kareem did not get a fair trial due to the Government's failure to make its
18 required disclosures timely. For this reason, the Court should enter a judgment of acquittal or
19 alternatively grant a new trial.

20 RESPECTFULLY SUBMITTED this 24th day of May, 2016.

21 **MAYNARD CRONIN ERICKSON**
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